Supreme Court, U.S.
FILED
MAY 3 1995
OFFICE OF THE CLERK

No. 94-12

In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, HAWAII, IDAHO, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, VIRGINIA AND WEST VIRGINIA SUPPORTING THE STATE OF FLORIDA, ET AL.

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INTEREST OF AMICI STATES

This case is more about federalism than about Indian tribes. Although the Parties are nominally an Indian tribe and a State, the conflict which brings the case to this Court is between the Congress of the United States and the governments of the several States of the Union. This case involves a statute which directly mandates State participation in a federal regulatory program and seeks to enforce that mandate through federal court action. In so doing, the statute offends the principles of federalism: the idea that we enhance our freedom by diffusing sovereign power "by the creation of two governments, not one." *United States v. Lopez*, ___ U.S. ___, ___, (Kennedy, J., concurring, slip op., at 11).

The sovereign interests of all the States of the Union – those with Indian lands within their borders *as well as* those without – are seriously jeopardized by the method chosen by the Congress to implement this legislation. The statute here directly commands the States to do certain acts, as if the States were mere subdivisions of a national government. No choice, incentive or acceptable alternative is given a State under this legislation. States must comply or face federal court orders.

Thus, the issues in this case go to the heart of our federal system of government – the relationship of States of the Union with the Federal Government and the autonomy of States to govern their own citizens.

SUMMARY OF ARGUMENT

Congress does not have the authority to abrogate State sovereign immunity under any of its Article I powers. The States, in creating the Union, did not agree to allow the federal Congress to create jurisdiction over them in suits brought by private parties against their consent.

The Eleventh Amendment of the United States Constitution is emblematic of the States' deeper sovereign immunity, part of the understood background against which the Constitution was adopted: without their consent, either expressly given or "inherent in the plan of the convention," States are immune from suit in federal courts. The immunity enjoyed by the States extends to all suits, regardless of the relief sought. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S. Ct. 684, 688 (1993).

Petitioner, Seminole Tribe of Florida, asks the Court to reject that history and understood background of the Constitution, and to extend the limited holding of its 1989 plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to other Article I powers of Congress, so as to provide Congress with a unilateral authority to allow suits against States in federal courts by private citizens. Brief for Petitioner, at 17. This Court has never before accepted that view, nor should it now.

Amici States ask the Court to reject Petitioner's claim; to reaffirm that Article I, standing alone, does not grant Congress unilateral authority to abrogate State sovereign immunity – a separate waiver of State sovereign immunity is constitutionally required; and to restore the

Constitutional balance between federal and State authority "inherent in the plan of the [constitutional] convention" by overturning the 1989 plurality opinion of the Court in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Certainly, the Court should reject the notion that the powers given the Congress over Indian affairs gives it authority to abrogate State sovereign immunity, immunity that this Court has recognized, as Petitioner concedes, was never surrendered to Indian tribes in the plan of the convention. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

The United States, appearing amicus curiae, contends Congress has the power to abrogate State sovereign immunity under the extensive plenary power that it has over Indian affairs, reflecting the erroneous assumption that a plenary power given the Congress includes the authority to subject States to suit in federal courts by private citizens. Brief for United States, at 24-25. The United States also argues, citing *Ex parte Young*, 209 U.S. 123 (1908), as its basis, that state officials can be sued in federal court for prospective injunctive relief under the Indian Gaming Regulatory Act of 1988 ("IGRA"), not merely to restrain an official from performing an unconstitutional act, but to compel the undertaking of any obligation imposed by federal law, without regard to the official's conduct or whether the obligation is discretionary.

Ex parte Young does not support the United States' contention. A litigant may not avoid the jurisdictional proscription of the Eleventh Amendment by the expedient of naming a state officer as a Defendant, when it is the State that is ultimately compelled to take action. In

fact, IGRA, by its own terms and in its practical effect, is directed at the State *qua* State. To the extent a suit is maintained against the governor of the State, or any other state officer, seeking to compel that officer to exercise the sovereignty of the State in its sovereign capacity, it is a suit against the State and is barred by the Eleventh Amendment. Finally, because IGRA directly coerces the States to negotiate and complete tribal-state gambling compacts and sanctions a lawsuit in federal court to compel this exercise of sovereign legislative discretion, it is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I.

ARTICLE I DOES NOT GRANT CONGRESS AUTHORITY TO ABROGATE STATE SOVEREIGN IMMUNITY.

In this case, the Court is presented with the novel assertion that Congress has unilateral authority to abrogate State sovereign immunity acting solely under the Indian Commerce Clause, an Article I power. This Court has never endorsed that view. The implications of the argument are far broader than the statute at issue here, or even Congress' specific authority under the Indian Commerce Clause, upon which IGRA is explicitly based. The assertion presupposes that any Article I power gives Congress the power to abrogate State sovereign immunity, abandoning the long-standing constitutional requirement of a separate waiver.

A. The States Entered Into The Union With Their Sovereignty Intact, Including Their Immunity From Suit As Sovereigns.

When the States entered into the Union, they did so with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581. " 'The Constitution . . . leaves to the several States a residuary and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment." *New York v. United States*, 505 U.S. ___, 112 S. Ct. 2408, 2434-35 (1992), *quoting The Federalist*, No. 39.

One of the most important aspects of that retained sovereignty is State sovereign immunity. For nearly two hundred years the analysis expressed by Alexander Hamilton in the Federalist, No. 81, guided this Court's determination of State sovereign immunity claims:

> It is *inherent in the nature of sovereignty*, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States[.]" (Emphasis added.)

1. The Eleventh Amendment Preserves State Sovereign Immunity.

Article III of the Constitution explicitly grants to the federal judiciary authority to adjudicate claims involving States in certain enumerated areas. The Eleventh Amendment just as explicitly limits that authority.

> This withdrawal of jurisdiction [in the Eleventh Amendment] effectively confers an immunity from suit. Thus this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.

Puerto Rico Aqueduct v. Metcalf & Eddy, 121 L.Ed.2d 605, 612 (1993) (citations omitted); *see also, Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984).

The Eleventh Amendment of the United States Constitution reflects the states' deeper sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . . " *Pennsylvania v. Union Gas*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part and dissenting in part); *see also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Thus, the States, in creating the Union, did not contemplate federal jurisdiction over suits brought against them against their consent. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). Whether the Eleventh Amendment is wholly jurisdictional or more fundamentally tied to the question of a sovereign's consent, it is clear that its passage was the result of the "shock of surprise throughout the country" at the decision of the Supreme Court in *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), permitting the suit against Georgia by a citizen of another State. The Amendment was proposed and ratified with "vehement speed," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting), from March 4, 1793 to February 7, 1794.

In *Hans v. Louisiana*, the Court made it clear that the Eleventh Amendment's effect was to overturn the result in *Chisholm* and restore the "original understanding" that Article III's grant of federal court jurisdiction did not extend to suits against the States. *Hans*, 134 U.S. at 14-16. This original understanding supported the view that immunity flowed not from the Eleventh Amendment, but from broader concepts of state sovereign immunity generally.

> Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'

Monaco v. Mississippi, 292 U.S. 313, 322-323 (1934) (quoting A. Hamilton, *The Federalist*, No. 81).

2. States May Not Be Sued Unless Their Immunity Is Waived.

Reflecting the view that the state judicial immunity derives from a broader, general governmental immunity, it follows the immunity is a privilege that the State may waive at its pleasure. This may be done expressly, or impliedly, as suggested by the language of Alexander Hamilton: consent may be implied where there has been a "surrender of this immunity in the plan of the convention." *Monaco*, 292 U.S. at 323.

This surrender of immunity, or implied waiver, is found in the plan of the convention in suits against the

States by the United States because of the Supremacy Clause and because the allowance of such suits was inherent in the agreement to be bound by the Constitution. *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Similarly, the states may sue each other since, inherent in the nature of a federated republic, is the idea that there should be a forum in which states can sue each other on an even footing. *Monaco*, 292 U.S. at 327-328; *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904).

Upon the adoption of the Fourteenth Amendment, a new source for the surrender or withdrawal of immunity appeared by virtue of the purpose and text of the Fourteenth Amendment – which was explicitly addressed to controlling State action – and necessarily limited the reach of the earlier adopted Eleventh Amendment. When acting pursuant to § 5 of the Fourteenth Amendment, Congress can annul, or abrogate, the States' sovereign immunity without the States' consent. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), relying on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). This authority, however, was still derived from a separate constitutionally-based surrender of State immunity – as the Court repeatedly noted in *Fitzpatrick*.

3. Abrogation Is An Analytical Corollary To A State's Waiver Of Immunity, Not A Separate Congressional Power.

"Waiver" has been the consistent hallmark of this Court's determination of State sovereign immunity claims. The *only* circumstance in which the Eleventh Amendment does not bar suits against a State in federal

court is where a State has consented to such a suit. *In Re State of New York*, 256 U.S. 490, 497 (1921).

It was in *Fitzpatrick* that the Court first used the word "abrogation" to express its view of the intersection of Congress' Article I authority to legislate in a given field and the federal judiciary's Article III authority to hear cases brought pursuant to such legislation. Implicit in the concept of congressional abrogation is not just delegation of federal authority to *legislate* in a particular sphere, however, but a surrender of State sovereignty to the *judicial* authority of the United States.

"Abrogation" has never been deemed by this Court as a separate power granted to Congress, as asserted by Petitioner. Brief for Petitioner, at 20. Rather, it is a shorthand expression used by the Court to express Congress' exercise of its power when coupled with a pre-existing, constitutionally-based *separate* waiver of State immunity. Such an "inherent waiver," albeit dormant, is given life when Congress speaks. There is no separate power to *abrogate* a retained right of the States. Rather, more properly speaking, Congress is enabled to make States liable to suit in federal court because of a preexisting, inherent waiver given to it by the States. Thus, any such power in Congress can go no further than the waiver that was initially made by the states "in the plan of the convention." When viewed in that light, it is clear that the States made no such broad-gauged waiver as is argued here, or as was suggested in *Union Gas*.

B. *Pennsylvania v. Union Gas* Represents A Radical Departure From Prior Case Law, Is Constitutionally Unsound, And Should Be Overturned.

In 1989, this Court, in a splintered and ambiguous plurality decision, decided that the power granted to the Congress in Article I of the Constitution to regulate interstate commerce was also a limitation on the sovereign immunity of a State, thereby allowing Congress to subject States to suit in federal court by private citizens. *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). The premise of *Union Gas* was that Congress' power to regulate interstate commerce would be incomplete if Congress could not subject the States to suit in the federal courts. Amici States contend the *Union Gas* decision is constitutionally unsound and its rationale effectively eviscerates the Eleventh Amendment. To understand why *Union Gas* is constitutionally unsound it is necessary to review the intersection of Articles I and III of the Constitution.

1. The Jurisdiction Of The Federal Courts Is Determined By Article III, Not By Congress Under Article I.

The powers of Congress are set forth in Article I of the Constitution, the scope of judicial authority in Article III. Because of this separation, one branch may not expand or otherwise affect the inherent constitutional authority of any other branch. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to

the crisis of the day." *New York, supra*, 112 S. Ct. at 2434. Although Congress is given the power to make laws, including the power to create causes of action under federal law, it cannot create jurisdiction in federal courts which is not otherwise established by Article III.

Petitioner's argument deviates from this established rule by suggesting that Congress can unilaterally create jurisdiction, secured by the Eleventh Amendment, whenever it legislates under its Article I authority. This construction skews both the balance of authority inherent in the federal structure of the Constitution and the balance of responsibilities between the federal judicial and legislative branches. It further ignores that

> Congress exercises its conferred powers subject to the limitations of the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.

New York, supra, 112 S. Ct. 2408, 2418. This Court in *New York* continued by pointing to the limitation on the power of Congress found in the Tenth Amendment: "the power of the Federal Government is *subject to limits* that may, in a given instance, reserve power to the States." *Ibid.* Recently, this Court relied on the principles of federalism to invalidate an Act of Congress where the latter branch so interfered in State matters using its commerce clause powers that it "upset[] the federal balance," thereby bringing this Court to "recognize meaningful limits on the commerce power of Congress." *United States v. Lopez*, ___ U.S. ___, ___, (Kennedy, J., concurring, slip op., at 17).

Similarly, in *Blatchford* this Court found that the judicial authority in Article III is limited by State sovereign immunity as exemplified by the Eleventh Amendment. *Blatchford, supra*, 111 S. Ct. at 2581; *Accord Hans, supra*, 134 U.S. at 14-16; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Welch v. Texas Dep't of Highways & Public Trans.*, 483 U.S. at 487.

2. *Pennsylvania v. Union Gas* Should Be Overturned.

The fundamental error of *Union Gas* is its misapprehension of the relationship between the nature of Congress' Article I powers and the federal judiciary's Article III authority over the States. *Union Gas*, and the Indian Gaming Regulatory Act suits at issue in this case, represent *private rights of action against States*. It was the pursuit of precisely that remedy which the Eleventh Amendment was enacted to forbid.

There are numerous areas where Congress has the authority to legislate, and Congress has at its disposal a variety of mechanisms to encourage State compliance.[1] What Congress does not have the authority to do, however, is create a private right of action against a State to enforce a federal mandate, *without a separate waiver of State immunity*, either express or inherent. As the Court noted in Blatchford, just because the federal *government*

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[1] For example, Congress can restrict the availability of federal funds to States, or make them contingent upon an express waiver of State immunity; it can regulate directly in the absence of a State assertion of authority; and, in some circumstances, may even sue States directly to require compliance. See *New York, supra*, 112 S. Ct. at 2423.

can sue a State, does not mean that Congress can authorize *others* to do so. *Blatchford, supra*, 111 S. Ct. at 2584.

The premise of the 1989 plurality decision announced in *Union Gas* was that the Interstate Commerce Clause represented a surrender of State immunity "inherent in the plan of the Convention." There is no such waiver. *Union Gas* is the first and only time that this Court has found a constitutionally-based waiver of State sovereign immunity beyond that arising from state-federal and state-state relationships, and, by clear implication, in the Fourteenth Amendment. In so finding, *Union Gas* is a radical departure from the Court's previously uniform precedents regarding inherent waiver.

The plurality opinion in *Union Gas* also launched what has become an increasingly detailed search by litigants for other "implied" waivers of State immunity in diverse provisions of the Constitution, and herculean efforts to shoehorn legislation into the analytical niche created by the decision.[2] These pursuits have done serious damage to the fundamental balance of authority between the State and federal governments inherent in the structure of the Constitution.

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[2] The Amicus Brief of the National Indian Gaming Association typifies this effort. Although neither the Act nor its legislative history make any reference to interstate commerce, amici tribes contend that it "must have been on Congress' minds." The Eleventh Circuit properly rejected this line of argument. *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1027, n. 13 (11th Cir. 1994); *see* S.Rep. No. 446, 100th Cong., 2d. Sess. 1, p. 2 (1988); 25 U.S.C. §§ 2701(3), 2701(4), 2702(3).

As the Eleventh Amendment is a *limitation* on the Article III jurisdiction of the federal courts, Congress cannot change that limitation through the exercise of Article I powers. This is an appropriate case in which to abandon the plurality decision in *Union Gas*. At a minimum, this case presents an opportunity to confine *Union Gas* to its facts and not to extend its reach. Otherwise, the Eleventh Amendment is transformed from a constitutional wall to a statutory hurdle, easily cleared by congressional recitation of a "clear" intent to abrogate the States' sovereign immunity.[3] That is not what the framers of the Constitution, or the States which ratified it, intended.

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[3] One example is the passage last fall of amendments to Section 106 of the Bankruptcy Code which were explicitly directed at overturning this Court's earlier holding in *Hoffman v. Conn. Dept. of Income Maintenance*, 492 U.S. 96 (1989). Those revisions, which are to be applied *retroactively* allow a private individual to force a state into a federal bankruptcy court anywhere in the country to defend enforcement and collection activities that were fully legal at the time they took place. The difficulties this imposes on state governments is exacerbated by the short notice periods in bankruptcy cases and the financial strains of defending out-of-state litigation. As such, the States are highly vulnerable to frivolous or bad faith filings by parties who challenge *bona fide* actions of the state simply in the hope that the States will be unable to defend themselves adequately. For that reason, we suggest that this Court must consider carefully the ramifications of upholding the rationale of *Union Gas*, particularly if that rationale is given an expansive reading that could be expanded to other Article I powers such as the Bankruptcy Clause.

II.

EVEN UNDER *UNION GAS*, CONGRESS DOES NOT HAVE THE POWER TO ABROGATE STATE JUDICIAL IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE.

Even if the Court chooses not to address *Union Gas* in the context of this case, the reasoning of that case does not logically extend to the Indian Commerce Clause. As Petitioner acknowledges, Florida did not expressly waive its sovereign immunity and the Indian Commerce Clause contains no such inherent waiver. Brief of Petitioner, at 16, citing *Blatchford*, 501 U.S. at 779. The Indian Commerce Clause does not, therefore, represent a waiver of State immunity empowering Congress to make States liable to private litigation in federal court.

This Court's conclusion in *Blatchford* that there was no *waiver* of sovereign immunity "inherent in the plan of the convention,"[4] is a compelling answer to why Congress does not have the power to *abrogate* state sovereign immunity under the Indian Commerce Clause. States did

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[4] What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S. Ct. at 2582-83, emphasis in original.

not contemplate granting Congress power to nullify an immunity which they did not intend to surrender, nor did the States contemplate that Congress would have the power to compel the States to perform acts wholly within the scope of federal responsibility.

This Court has not previously found congressional power to abrogate state sovereign immunity when legislating pursuant to the power to regulate commerce with Indians. Nevertheless, several Circuit Courts have done so, citing *Union Gas* as their authority. The Eighth, Ninth and Tenth Circuits found the power of Congress to abrogate state sovereign immunity under the *Interstate* Commerce Clause is equally "applicable" to the *Indian* Commerce Clause prong. *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 996 (9th Cir. 1994); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1430 (10th Cir. 1994). The Ninth Circuit went further and suggested that the *Union Gas* plurality framed its analysis in terms of the "Commerce Clause" as a whole, and did not limit it to the Interstate Commerce Clause prong. In contrast, the Eleventh Circuit in this case correctly noted that the *Union Gas* Court, in each of its opinions – plurality, concurrences and dissents – addressed *only* the interstate prong, and that its rationale goes only to the regulation of commerce *among the States*. *Seminole*, 11 F.3d at 1027.

A. Plenary Power Alone Does Not Give Congress The Power to Abrogate State Sovereign Immunity.

Amicus Curiae United States rests its application of *Union Gas* to the Indian Commerce Clause on the notion that that clause embodies a plenary power of the Congress that limits the power of the states, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (finding congressional power to abrogate under § 5 of the Fourteenth Amendment), and *Union Gas*, 491 U.S. at 19 (plurality opinion) (like the Fourteenth Amendment, the "Commerce Clause withholds power from the States at the same time as it confers it on Congress.") Brief for United States, 20-21. Under this reasoning, of course, any Article I power granted to the Congress by the States in the Constitution – since all arguably withhold power from the States in some way – would serve as a basis for congressional power to abrogate state sovereign immunity – rendering the Eleventh Amendment superfluous. It was just such an analysis that Justice Scalia cautioned against in his partial dissent in *Union Gas*:

> [I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to render the doctrine a practical nullity and is therefore unreasonable.

Pennsylvania v. Union Gas, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part).

However, only the Fourteenth Amendment and, arguably, the Interstate Commerce Clause provide any

rationale for abrogation. First, they explicitly limit the autonomy of State governments to take certain actions and provide for federal supremacy relating to those particular activities. Second, without conceding the wisdom of *Union Gas*, the plurality in that case expressed an important limitation on the power of Congress to summarily override a state's Eleventh Amendment immunity: the power to abrogate was found to exist only because Congress' power *would be incomplete* without rendering the States themselves liable in federal court. *Union Gas, supra*, 491 U.S. at 15, and at 19-20; *see also Fitzpatrick*, 427 U.S. at 456 (Congress' power to enforce the Fourteenth Amendment would be incomplete without the power to make the States, as employers, *liable in federal court* for unlawful employment discrimination: "Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). The same cannot be said about the Indian Commerce Clause. Congress' authority over Indian relations is *complete*, and need not involve the States at all.

B. Displacement Of States' Power Does Not Give Congress Power *Over* States.

The Indian Commerce Clause was not intended to affect the autonomous operation of a State government. Fulfilling a different purpose than the interstate commerce prong, it allocated the responsibility for that activity to the United States government.[5] While the plenary

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[5] The Eleventh Circuit below recognized the important distinctions in the respective purposes of Interstate Commerce Clause and the Indian Commerce Clause, noting the distinctly different purposes behind each clause:

> In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states [was] in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

Seminole Tribe v. Florida, 11 F.3d at 1027.

power of the Congress with respect to Indian affairs may *displace* the power of the States with respect to Indians, the Indian Commerce Clause does not permit Congress to mandate the States to assume the federal government's responsibilities with respect to Indian tribes – its displacement of the States simply leaves the States out of the matter. Nor does the Clause provide the power to abrogate state sovereign immunity to compel a State to perform an act otherwise solely within the scope of the federal government's responsibilities. This use of the federal courts to compel the States' performance offends not only the Eleventh Amendment, but also the Tenth Amendment, as discussed below.

To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, and in the *Interstate* Commerce Clause, *Union Gas*, 491 U.S. 1. The significance of finding yet another constitutional provision that gives

the Congress power to abrogate state sovereign immunity, one that permits the courts to compel States to perform certain acts, cannot be understated – it would lead to a critical undermining of the federal system of government and further strengthen the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989).

III.

EX PARTE YOUNG IS NOT AUTHORITY FOR AN ORDER COMPELLING A GOVERNOR TO EXERCISE THE SOVEREIGNTY OF THE STATE FOR THE SOLE PURPOSE OF EFFECTUATING A FEDERAL REGULATORY SCHEME.

Amicus curiae United States argues that *Ex parte Young*, 209 U.S. 123, permits a suit against a state official who is assertedly required under IGRA to negotiate with Indian tribes for class III gaming. Brief of the United States, at 12. This reliance on *Ex parte Young* is manifestly misplaced, for nothing in that decision, or any successor decisions by this Court, has ever suggested that the Eleventh Amendment does not bar a federal court from *compelling* the exercise of state sovereign powers in the first instance.

In *Ex parte Young*, plaintiff railroad stockholders brought an unsuccessful action to enjoin Young, the state attorney general, from enforcing a state law alleged to be unconstitutional. The question presented by *Young* was essentially this: Is a suit against the State's attorney general seeking to restrain unconstitutional conduct tantamount to a suit against the State itself for purposes of the

Eleventh Amendment? In answer to that question, this Court determined that, where a state actor's conduct is unconstitutional, the official is "stripped" of the mantle of state sovereignty and, therefore, neither the suit nor any consequent order requiring the state actor to bring his conduct into conformity with the Constitution offends the Eleventh Amendment. *Ex parte Young*, *supra*, 209 U.S. at 159-160; *see also, Pennhurst, supra*, 465 U.S. at 102.

The successors to *Ex parte Young* that are relied on by the Solicitor General thus concern the inquiry whether an order mandating prospective conduct by a state actor is tantamount to an order against the State itself. In each of those cases, the Court determined that the order was not against the State for purposes of the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (public assistance benefits); *Milliken v. Bradley*, 433 U.S. 267 (1977) (expenditure of public funds to remedy effects of past *de jure* segregation); *Quern v. Jordan*, 440 U.S. 332 (1979) (notice to class members of retroactive relief).)

In this case, however, there can be no reasonable doubt that a suit under 25 U.S.C. § 2710(d)(7)(B) is *necessarily* and *always* a suit against the State itself. Whether or not *Ex parte Young* and its progeny permit orders compelling affirmative conduct by state actors, no decision of this Court has ever read *Ex parte Young* to suggest that an order compelling a state officer to exercise the sovereignty of the State is permissible under the Eleventh Amendment.

Whoever may be the nominal defendant, a suit under IGRA is necessarily directed against the State in its sovereign capacity.[6] As a threshold matter, the statute on its face expressly states that an order issuing from any suit brought under IGRA is directed against *the State itself.* 25 U.S.C. § 2710(d)(7)(B)(iii). Indeed, such a suit *must* be directed against a State in its sovereign capacity, because, under IGRA, a tribal-state compact addresses issues related to the scope and extent of state police power on Indian lands within the State. 25 U.S.C. § 2710(d)(3)(C). Accordingly, an order directing a State "to conclude a compact," 25 U.S.C. § 2710(d)(7)(B)(iii), is necessarily an order compelling an unwilling State to exercise *sovereign powers.*[7]

Therefore, even if an order under IGRA is nominally issued against a state governor or any other nominal defendant chosen by the Tribe, rather than against the State itself, it is necessarily presumed that that officer exercises the sovereignty of the State vis-à-vis Indian Tribes and that that officer, therefore, has the power to negotiate and bind the State in a compact defining the extent of the State's sovereignty over lands within its

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[6] Petitioner named the State of Florida in this suit, in addition to Governor Lawton Chiles.

[7] In contrast, the orders issued in *Ex parte Young* and successor decisions of this Court sought to compel a state actor, *who is already exercising state governmental powers,* to bring his conduct into conformity with federal law. Thus, in the language of *Ex parte Young,* an injunction lies to "restrain" or to "prevent" the state actor from doing that which he has no right to do. *Ex parte Young,* at 159.

boundaries.[8] The order would be pointless otherwise. However, inasmuch as a suit against a state governor or other official under 25 U.S.C. § 2710(d)(7)(B) is a suit to compel the governor to exercise the sovereignty of the State, it is necessarily a suit against the State in its sovereign capacity and is therefore barred by the Eleventh Amendment.

IV.

THE TENTH AMENDMENT PROHIBITS APPLICATION OF THE COERCIVE PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

In IGRA, Congress directly commands the States to exercise their sovereignty by negotiating and implementing a tribal-state compact once requested by a tribe. Such a command deprives the States of their sovereign role, in violation of the Tenth Amendment. Under the Act, an Indian tribe retains the sovereign prerogative to request state participation in the regulation of gaming activities on Indian lands. 25 U.S.C. § 2710(d)(1)(C). If an Indian tribe requests a State to negotiate for a compact concerning class III gaming, the State "*shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The federal government, while it has broad plenary authority for Indian affairs, assumes minimal responsibility under this

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[8] Contrary to the suggestion of the Solicitor General, an order compelling a governor to exercise the sovereignty of the State cannot reasonably be characterized as an order compelling a "ministerial" act.

law for the formulation or implementation of a regulatory scheme for serious Indian gaming.

The *coercive* elements of 25 U.S.C. § 2710(d)(3), *require* States to negotiate, under pain of federal court compulsion. They reduce the States to mere administrative subdivisions of the Federal Government and do injury to their sovereignty. IGRA requires the States to exercise their sovereign discretion and carry out duti[illegible] which the federal government has chosen not to undertake. As this Court most recently reaffirmed in *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992):

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.

112 S. Ct. at 2434 (citations omitted).

The federal government may not *compel* a State to regulate in an area of federal responsibility. Indeed, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 112 S. Ct. at 2429 (emphasis added). When it comes to handling certain affairs, the States expressly vested in *Congress* responsibility for regulating commerce "with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Article I of the Constitution does not authorize Congress to avoid its obligation by forcing the several States to assume responsibility for handling Indian affairs.

Instead, Congress chose to compel a state to negotiate a tribal-state compact under 25 U.S.C. § 2710(d)(3)(A), at the request of a tribe; to subject that state to being hauled into federal court under a claim that it failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); to subject the state to the compulsion of a federal court order to further negotiate; to subject the state to compulsion to submit a last best offer to a court-appointed mediator; and to require the state to make a selection from the mediator. 25 U.S.C. § 2710(d)(7).

Congress may, of course *encourage* the aid of the States in regulating the conduct of gaming activities on Indian lands. *Red Lake Band of Chippewa v. Swimmer*, 740 F. Supp. 9, 13-14 (D.D.C. 1990), *aff'd*, *Red Lake Band of Chippewa v. Brown*, 928 F.2d 467 (D.C. Cir. 1991). Under Congress' spending power, it may encourage a state to regulate in a certain way, short of outright coercion, by attaching conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1936). Where Congress has the authority to regulate private activity under the Interstate Commerce Clause, Congress may offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981); see also *FERC v. Mississippi*, 456 U.S. 742 (1982) (where States are encouraged to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply). Where Congress encourages state regulation rather than compelling it, "state governments remain responsive to the local electorate's preferences; state officials remain accountable to

the people." *New York v. United States*, 112 S. Ct. at 2424. No such incentive is present under IGRA.

As with the coercive "take title" provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b et seq., struck down by the Court in *New York v. United States*, 112 S. Ct. at 2408, IGRA's scheme unconstitutionally coerces States into participation in IGRA by holding out two impermissible choices, two coercive applications of federal law: "the State *shall* negotiate with the Indian tribe," 25 U.S.C. § 2710(d)(3)(A), or else face litigation in federal court, 25 U.S.C. § 2710(d)(7)(A) – with the additional coercive processes of forced negotiations, 25 U.S.C. § 2710(d)(7)(B)(iii); mediation, 25 U.S.C. § 2710(d)(7)(B)(iv); and ultimately, of imposition of a federally prescribed regulatory system which may compel the state to create a system for regulating a game that is illegal within that state, 25 U.S.C. § 2710(d)(7)(B)(vii).

Nor does IGRA merely provide "encouragement," as opposed to a mandate, to achieve "cooperative rulemaking" with the tribe. IGRA, by its own terms, imposes a requirement on the states to fashion, implement and enforce a regulatory program which the federal government has not done itself. This constitutes a direct interference with the states' sovereign reserved powers to contract. *United States v. Bekins*, 304 U.S. 27 (1938). It is a direct commandment to the states to engage in a regulatory process or face the prospect of being sued in federal

court, with all of the attendant costs and risks associated with litigation.[9]

Nor are IGRA's remedial provisions a set of "default provisions," which leave a "choice" for States. A State's mere "choosing" to not negotiate must necessarily result in a court finding that the State is *in bad faith* before the mediational procedures ensue to the Tribes' benefit. Then, the State ignores at its peril a court order to *complete* a compact within a 60-day period. *States submitting themselves to being adjudged to be in bad faith and ignoring federal court orders at their own peril is not a legitimate choice nor would it be a responsible exercise of the State's sovereign authority and its legislative discretion.*

Finally, when Congress conscripts states into fashioning and implementing a regulatory scheme to achieve federal ends, congressional representatives avoid political accountability. In IGRA, the scheme created by Congress minimizes the accountability of federal officials to the public. The legislation mandates that the States "work it out" with the tribes. It is thus the *State* officials who must bear the brunt of public disapproval, while congressional representatives – and, of course, the Secretary of the Interior, who ultimately approves the regulatory scheme,

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[9] If IGRA only "encourages" "cooperative rulemaking," and compliance with IGRA's negotiation provisions is voluntary, then there would be no Article III "case or controversy" in IGRA cases. If the States do not negotiate in a voluntary arrangement, that is the end of the matter – there is then no controversy for the court to adjudicate, no need for orders to negotiate and mediate, and no reason for Article III courts to declare the rights of tribes to negotiate with an unwilling partner.

25 U.S.C. § 2710(d)(8) – remain insulated from the political consequences of the conduct of gaming on Indian lands. As Justice Kennedy noted in *United States v. Lopez*, ___ U.S. ___, federalism " 'serves to assign political responsibility, not to obscure it.' " (Kennedy, J., concurring, slip op., at 13), quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The result here leaves us unable to hold either branch of our dual federal-state government properly answerable to the citizens. *Id.*, at 13.

The States did not authorize Congress to impose upon them responsibility for determining the conditions under which casino gambling will be conducted on Indian lands within the State. Congress may either regulate such gambling directly, or Congress may permit the tribes to regulate such gambling exclusively; within either option, Congress may *invite* the States to undertake regulation of the activity in lieu of direct federal or tribal regulation. Such a scheme ensures the electoral accountability of federal and state officials, as the case may be, for the decisions made concerning the regulation of casino gambling on Indian lands. But Congress may not shield itself and federal officials from accountability for the conduct of casino gambling on Indian lands by making state officials responsible for fashioning the regulatory scheme – under threat of suit by Indian tribes who have no accountability to the electorate.

CONCLUSION

For the reasons stated here, the judgment of the Court of Appeal should be affirmed on the issues presented.

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May 3, 1995